THE NEW-YORK
CITY-HALL RECORDER.

VOL. VI. *December*, 1821. NO. 11.

At a COURT of GENERAL SESSIONS of the Peace, holden in and for the City and County of New-York, at the City-Hall of the said City, on *Monday*, the 3d day of *December*, in the year of our Lord one thousand eight hundred and twenty-one.

PRESENT.

The Honorable
RICHARD RIKER, *Recorder.*
JOHN BINGHAM and GEORGE B. THORP, *Aldermen.*

HUGH MAXWELL *District Attorney.*
RICHARD HATFIELD, *Clerk.*

BIGAMY—EVIDENCE

WILLIAM PHELAN'S Case.

MAXWELL and BUNNER, *Counsel for the Prosecution.*

PRICE and NIVEN, *Counsel for the prisoner.*

On the traverse of an indictment against P. for Bigamy, in marrying B., and afterwards C., while B. was alive, contrary to the form of the act, it was held, 1. that it was incumbent, on the part of the prosecution, to prove *a marriage in fact* between P. and B.; and, 2. that if P. wished to exculpate himself from the charge of Bigamy, because, at the time he married B., there was a disability on her part, to marry, by reason of a valid subsisting marriage between her and another man, that it was incumbent on P., to show that there was *a marriage, in fact*, between them; and it cannot be inferred, by the jury, that there was a legal subsisting marriage between them, merely because it appeared, in the progress of the trial, from the testimony of one not present at the marriage, that they had been married eight or nine years before, and that she passed by his name when married to P.

It is a general rule, that after the counsel on both sides have submitted their remarks to the jury, fresh testimony cannot be introduced; but this is a matter of discretion with the court.

After the counsel on either side, have addressed the jury, testimony of a fact, concerning which, such counsel must have been previously apprized, will not be received.

The prisoner, about forty years of age, was indicted for Bigamy. The indictment, which contained two counts, alleged, in the first, that on the 1st. of February, 1808, at and within the City and County of New-York, the prisoner married Eliza Buchanan; and that afterwards, to wit on the 11th of August 1821, he married Catherine Cain, the said Eliza Buchanan being then alive, contrary to the form of the act; and, in the second count, he was charged with the same offence, in marrying Mary Ann Phelan, in Ireland, in the Kingdom of Great Britain, and afterwards marrying Catherine Cain, while the said Mary Ann Phelan was alive, against the form of the statute in such case made and provided.

Bunner opened the case to the jury on behalf of the prosecution, stating, that the prisoner had been married in Ireland: that he came to this country, and, three or four years ago, married Eliza Buchanan, lived with her some time; and, in the month of August last, married Catherine Cain. The prosecution, however, did not rely on the marriage in Ireland; but if, in the progress of the trial, this should appear, it would be well. The circumstances attending both marriages in this country, especially that with Mrs. Cain, would show that he was prompted by sordid and mercenary motives.

The Counsel proceeded to show the importance of the matrimonial connection in the community, and he expatiated on the injury inflicted on a woman who had been deluded into that connection, by one, between whom and another woman, there was a valid and subsisting marriage.

Nancy Hudson, a black woman, on being sworn, testified, that nearly three years ago, on a Tuesday night, snow being on the ground, she saw the prisoner married to Eliza Buchanan, at a house in that part of Spring street, between Broadway and the North River.

During a critical cross examination, the witness further stated, that Mrs. Buchanan then kept a boarding house, at the corner of Fulton and Water street; and that previous to the marriage, the

prisoner was a boarder in the house, and the witness a servant. She accompanied the parties, on foot, to this house in Spring Street, which was of brick, unfinished, and standing on the left hand side of the street, in going down. After staying there a short time, she was called as a witness to the ceremony, by the clergyman, who was a tall slim man, having on a plaid cloak. He read from a book, they took each other by the hand, agreed to be man and wife, and he pronounced them such. They lived together as man and wife, three or four months, and then removed to Petersburgh, Va. and staid two years. This wife is now alive. The marriage was known and talked of in the house: it was put in the papers and read by him next day in the family. Mrs. Buchanan had then three daughters, women grown, who were displeased at the match; and no person accompanied them, to be married, except the witness.

Catherine Cain, being sworn, testified, that on the 11th of August last, she was married to the prisoner, in this city, by the Rev. Mr. Chase. In two or three weeks afterwards, she made discoveries, which raised a strong suspicion in her mind that he had another wife. She found a letter, in his pocket, from a woman in Ireland; and she heard reports, from various sources, that he was married to Eliza Buchanan who was alive, when he married the witness. She charged him with the fact; but he said that his former wife in Ireland was dead; but denied that he was ever married to Eliza Buchanan, who, as he alleged, had been his housekeeper. The witness went to several places, to ascertain the truth of the report, relative to his marriage with this woman, found that she was in Norwich in Connecticut; and, after writing her two letters, she came to this city, and is now present in court. The witness understood that the Rev. Mr. Perine married them; but he is absent from the city.

On the cross examination of this witness, it appeared that her maiden name was Carmichael: that she had a son, now very young, by Cain her former husband: that, by her industry, she had accumulated sufficient to purchase eighty shares in the Mechanic's bank, and to deposit $600 in the savings bank, which she kept for the benefit of this lad: that when she married the prisoner, she was ignorant of the law, that the personal property of the wife vested in the husband; and that after one months acquaintance, (to my shame, said she in her testimony, I acknowledge it) she married him: that when he discovered or suspected that she had this property, he procured a false key, opened her desk, and took away all her papers, and endeavoured to procure a transfer of the shares, by which he might get hold of the money, Fortunately for her, he failed in his object; and he then beat and abused her, to that degree, that she was afraid of her life, and applied to the police, and he was committed to bridewell.

The prosecution rested.

Price opened the defence. He admitted that the prisoner was married to Catherine Cain, but rested the defence on the ground, that he never was married to Eliza Buchanan. The only testimony, of that fact, is from the black woman; and after the introduction of the testimony on the part of the prisoner, he hoped that the jury would be satisfied that there was no marriage consummated between them.

The counsel proceeded to read, from the Commercial Advertiser of March 6th 1819, a notice, stating that on Tuesday evening last there was married, by the Rev. Mr. Bork, William Phelan to Mrs. Eliza Buchanan, of Norwich Connecticut.

The Rev. Christian Bork, on being sworn, referred to a book, kept by him, of the marriages which took place, before him, a number of years back, and, especially in the year 1819. He testified, that he was very particular in recording all marriages solemnized by himself; still, he could not say he was infallible, in that particular. On referring to his book, he found no entry of a marriage, between William Phelan and Eliza Buchanan, in March 1819, nor had the witness any recollection of the fact.

Miss Nancy Downs, sworn on behalf

of the prosecution, testified that about three years ago, she heard the prisoner acknowledge that he was married to Eliza Buchanan.

Price: This is not evidence of a marriage in fact.

Bunner: It is good additional testimony.

This witness then proceeded to state, that she was one of the daughters of Eliza Buchanan, by a former husband: that her mother kept a boarding house, and the prisoner boarded there: that it was a subject of conversation, in the house, that the marriage would take place; but that the witness and her two sisters were much averse to the match; for, she believed that he had introduced himself through deception: that the next day after the marriage, he showed the witness his marriage certificate, and requested her to read it, but she refused. He also exhibited the newspaper, in which the notice of the marriage was inserted: that he took the head of the table: that, shortly after the marriage, he made a wedding supper, and invited his friends; and finally told the witness, that he was her father in law, and demanded from her a corresponding line of duty. The prisoner lived with his wife, from the beginning of March, until a few days before the second quarter, when he persuaded her to pack up the goods, and abandon the house, to avoid the payment of the rent. They then removed to Petersburgh, and she returned to this city before he did.

Price, in cross examining this witness, inquired of her particularly about her father. She answered that he was a seafaring man whom she could scarce remember. She understood that he died abroad twenty years ago, but she did not otherwise know the fact,

Bunner said that this mode of inquiry would not benefit the prisoner; for, it was incumbent on him to show a marriage in fact. This had been done, on the part of the prosecution; and the rule was reciprocal.

The witness further stated, that her mother was married to Buchanan; about nine years ago, but the witness did not state that she saw the ceremony, or, that he was now alive or dead; The inquiries, leading to those facts, not being put to her by the counsel on either side.

Augustus Spencer, sworn on behalf of the prosecution, testified, that he kept a store, near the place occupied by Mrs. Buchanan, at the time it was said she married the prisoner; and had been in the habit of supplying the family with goods before and after that time. She assumed his name; and the prisoner came to the witness, and told him to charge articles to him, acted, in every respect, as the head of the family, and paid him a debt, of $10, which she had contracted, in purchasing articles, before the marriage.

Reuben Clark,—captain of the city watch, on being sworn, testified, that he had known Catherine Cain, eleven years, and she had ever sustained the character of a hard working, industrious woman; and that her character, in every respect, was unexceptionable. A short time after her marriage with the prisoner, the witness heard the cry of murder in the house, went in, and found him abusing her, and carried him to the watch-house.

These are the material facts, testified to by the witnesses, though not in the order in which they occurred on the trial; for, several of the witnesses, after being examined and cross examined, were again called, after other witnesses had delivered their testimony.

Price inquired of the opposite counsel, whether it should be considered that the testimony, on both sides, was closed; and he wished to know distinctly, from the court, whether any testimony could be introduced after the counsel on either, or both sides, had addressed the jury.

Bunner stated that the prosecution, at present, was not aware that it would be necessary to introduce any additional testimony. He did not think that any more would be introduced on that side; but, he was averse to stipulate, because the superior sagacity of the opposite counsel might enable him to discover, and point out, some fatal omisssions, in proof, which it would be necessary to

supply; and, in that case, the court, in their discretion, would grant the indulgence.

The Recorder said that it was a general rule, that after the counsel had submitted their remarks to the jury, no additional testimony could be introduced; still the court, in its discretion, might relax the rule, to subserve the great ends of public justice.

Before the prisoner's counsel had addressed the jury, Bunner cited, for their consideration, *Joseph Truman's* case, (1. East's Crown Law, p. 470.) In that case it was decided, by the judges of England, in 1795, that proof of the prisoner's cohabiting with, and acknowledging himself married to, a former wife, then living, backed by the production of a copy of a proceeding of a Scotch court, against them for having contracted such marriage, improperly; (the marriage, however, being still good, according to that law) was sufficient evidence, of the first marriage, on an indictment for Bigamy.

The counsel for the prisoner contended, 1. That the testimony of a marriage *in fact*, between the prisoner and Eliza Buchanan, as derived from the testimony of the coloured woman, was too loose and uncertain. That this Mrs. Buchanan, lived with the prisoner in a state of concubinage; and, for the purpose of covering her own shame, had the address to cause this advertisement to be put in the papers; and that the two women, actuated by diabolical malignity, towards the prisoner, had combined to effect his destruction; and, for that purpose, had suborned Nancy Hudson. 2. As the proof stands, the marriage, between the prisoner and Mrs. Buchanan, could not legally take place. It has appeared by testimony, on the part of the prosecution, *that she was married to Buchanan;* but, it has not been shown, either that he was dead, or, that the marriage contract was, in any other manner dissolved. It is to be presumed, therefore, that at the time when it is alleged this marriage in fact took place, that there was a subsisting marriage between this woman and Buchanan. The counsel referred to several authorities in East's Crown Law, under the head of Polygamy, to show, that if she was married to Buchanan, she could not legally marry the prisoner.

Bunner summed up the evidence on behalf of the prosecution. He admitted that if the jury should believe, that at the time the prisoner married Eliza Buchanan, there was a valid, subsisting marriage, between her and another man, they would be bound to render a verdict of acquittal. But, he conceived that they could not come to that conclusion, consistently with the law applicable to this case and the facts. He averred it to be the law, that if the prisoner wished to exculpate himself from a charge of Bigamy, on the ground of a legal impediment, on the part of the woman with whom he contracted the first marriage, he was bound to show, affirmatively, that there was, then, a valid, subsisting marriage between her and another man.

The burden of proof was cast *on him: he* was bound to show a *marriage in fact;* and not leave it, as a matter of inference to the jury. Had such testimony been introduced, on his part, the prosecution was prepared to show a divorce; but, reposing on the law, the prosecution was willing to let the matter rest on the basis where it now stands.

The proof of the first marriage is conclusive; and the testimony of Nancy Hudson is fully corroborated. The counsel referred to the testimony, upon which he commented, and left the case to the jury.

Price, at this stage of the cause, offered to show, by a witness then present, that Buchanan, not more than a year ago, was alive; and he was willing that the opposite counsel should show a divorce if in their power.

Bunner said he was willing to try the case over again; but the Recorder delivered the opinion of the court, that after the counsel had submitted their remarks to the jury, no testimony, of any fact, of which the counsel were previously apprized, could be received.

The Recorder, in his charge to the jury, instructed them, that Bigamy con

sisted in this: where a person, of either sex, being married, shall afterwards marry another; the former wife, or husband, being then alive. It is a violation of the matrimonial connection, which is the most important and sacred of any in a civilized country. Whenever it is violated, the legislature has provided a remedy; declaring it a felony and subjecting the offender to punishment, by imprisonment, in the state prison, for any term not exceeding fourteen years, in the discretion of the court. (1. Rev. L. 113. 409.)

The court and jury are bound, wherever there has been an infraction of this law, to enforce its provisions. They are thus bound, in the first place, as they regard the laws of their country; in the second place, as they regard the principles of religion, and, in the third place, as they regard the sentiments of honour.

The prisoner at the bar has placed his defence on two grounds: 1., That at the time he married Eliza Buchanan, she was not in a situation to marry him, by reason of a valid, subsisting marriage with Buchanan; and 2., that he did not, in fact, marry her.

With regard to the first ground of defence, it is the opinion of the court, that if he wished to avail himself of that objection, the law renders it incumbent on him to show, affirmatively, that when he married this woman, there was a legal, subsisting marriage, between her and another man. The ground assumed is, that Buchanan was alive; but this is not proved. This ground of defence, therefore, fails.

Throughout this investigation, the only matter of controversy, and that which has principally engrossed the attention of the court and jury, is, whether there was *a marriage in fact* between the prisoner and Eliza Buchanan. His counsel have rightly urged, that it is necessary, in a prosecution for Bigamy, to prove, in respect to the first marriage, that it was a marriage *in fact;* but the jury will bear in mind, that it is not necessary, in this country, that the marriage should be solemnized by a clergyman. If the parties agreed, in presence of a witness, or witnesses, to be man and wife, it is sufficient; and if, in this case, the jury should believe, that the prisoner did agree to take Eliza Buchanan, as his wife, and that she agreed to take him, as her husband, as stated in the testimony of Nancy Hudson, this is sufficient to constitute a valid marriage, though the person who officiated as a clergyman was not one.

The Recorder here adverted to the testimony of Nancy Hudson, which he briefly stated; and charged the jury, that if they believed it, they ought to convict the prisoner. It had been urged by his counsel, that she is perjured: that his first wife, Buchanan, and Catherine Cain, have united together to produce his conviction, by means of the testimony of this black woman. But, to arrive at so harsh a conclusion, it would be necessary for the jury to believe, that Nancy Downs and Augustus Spencer, the latter of whom is, at least, without prejudice, are also perjured.

The Recorder, here, briefly recapitulated their testimony, respectively.

Now in the face of all this testimony, the prisoner calls upon the court and jury to say, that when he took the head of the table as the master of the house—when he exacted obedience from the daughter as her father in law,—when he told Mr. Spencer to charge articles, received by the family, to himself—when he paid a debt, contracted by Mrs. Buchanan, before marriage; and when he permitted her to assume his name, that it was all a fraud and imposition! These women, it is true, are indignant; and there is reason for their being so: the family of the first wife has been broken up, and she is ruined. And he has brought obliquy and disgrace on the other; for, during their connection, while she supposed herself to be his lawful wife, she was, in truth, living with him, but as a concubine.

He was immediately convicted.

On the last day in the term, Niven moved the court to suspend the sentence, that his counsel might have an opportunity to move for a new trial, or in arrest of judgment.

The court denied the motion; and the

Recorder, pronouncing the sentence, in an impressive address, stated, that the prisoner had violated the laws of the land, the principles of religion, and the sentiments of honour—that there was reason to believe, from what had transpired on the trial, that he had a wife living in Ireland; and his Honour concluded by observing, that the only reason why the court did not proceed to the full extent of their power, in his punishment, was, that there was, in fact, a degree of censure to be attached to the conduct of the woman whom he married, in entering into the matrimonial state, so shortly after an acquaintance, and before they had time to find out his character.

For that reason, and as a rebuke to the fair sex, for such hasty and inconsiderate connections, the court had concluded to sentence him, to the state prison, but for ten years. He was sentenced accordingly.

RECEIVING STOLEN GOODS—SCIENTER—

DANIEL BELL, alias EBER J. S. BELL'S Case.

MAXWELL, *Counsel for the prosecution.*

PRICE and NIVEN *Counsel for the prisoner.*

The possession of stolen goods, where the prisoner does not account for such possession, raises but a presumption of guilt, which may be rebutted by circumstances.

The declaration of the wife, in the presence of the husband, not contradicted by him, is good evidence

On the traverse of an indictment for receiving stolen goods, knowing them to be stolen, it seems that the counsel for the prosecution, will not be permitted, for the purpose of establishing the scienter, to show that stolen goods, not laid in the indictment, were found in the house of the prisoner.

Every case of receiving stolen goods depends on its own intrinsic circumstances.

The prisoner by the name of Daniel Bell, was indicted for grand larceny, in stealing a woman's satin coat and a cloak and other articles mentioned in the indictment, the property of Martha Kelly, on the 8th of January last; and, he was also indicted by the name of Eber J. S. Bell, with his wife Cynthia, for receiving a merino shawl, and other articles specified in the indictment, the property of John F. Perfect, on the 19th of November last; which goods had been stolen by Henry Gamble and Thomas Turney.

On the traverse of the first mentioned indictment, it appeared in evidence, that the goods were lost by Martha Kelly, at the house of Mr. Gibson who kept a porter house, at the time laid in the indictment, at 233 Bowery. There was a supper there the evening the articles were stolen: they were taken from her trunk; but the prisoner was not a guest, nor was he there, to her knowledge.

Joseph L. Hays one of the police officers, testified, that on the 23d. of November last, he found the satin coat, laid in the indictment, at the grocery store of the prisoner (in Cherry near Walnut street) who gave no account of the possession of the article.

Maxwell inquired of this witness, what the prisoner's wife said, at the time.

Price objected to any declarations of the wife, for the purpose of inculpating the husband; but, the Court overruled the objection, and decided, that the declarations of the wife, or any other person, in the presence of the prisoner, uncontradicted by him, were admissable.

The witness then testified that the wife of the prisoner stated, in his presence, that she bought the coat in Virginia, and brought it to this city.

Daniel Storm, sworn on behalf of the prisoner, testified, that during the last winter, Mrs Bell, purchased the coat of a boy, for $6, 50, who said, that it belonged to his mother, living in Pike Street, and that being distressed for money, she had sent him to sell it.

Justice Abel, one of the police magistrates, testified, that Storm had been tried in this city, several years ago, for the murder of his wife; and that his character was bad.

Maxwell, for the purpose of contradicting the testimony of Storm, offered to prove by Resolved Stevens, Clerk of the police, what account the prisoner's wife gave of the possession of the coat, not in presence of her husband.

On an objection to this testimony, it was overruled by the court; and, after the counsel had summed up on both sides, and the Recorder had charged the jury, the prisoner was acquitted.

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On the traverse of the other indictment, Harriet Perfect, the wife of John F. Perfect, testified, that she lost the Merino shawl, a pair of gloves and a work bag, from her house in Broome Street, and, the next morning, went to the prisoner's house, and asked him whether the shawl had been left there the preceding night. He said that it had not, as he knew of; but if it had been, his wife must have bought it; but that he had told her not to take such things. The witness told him, that she had lost other things: that she was certain the shawl was there; and that if he did not deliver it to her, she would get a search warrant. He then went to the foot of the stairs, called on his wife, and inquired for the shawl; but she denied it was there, and persisted in the denial, until she was told, by the witness, that a young man, named Joseph Gamble, had told her that he saw a person bring it there and sell it to her. She then acknowledged, to the witness, that a boy brought it there and sold it for 5*s.* and two glasses of cordial; but this was not said in the presence of the husband.

Henry Gamble, a boy thirteen years old, being brought from Bridewell and introduced as a witness for the prosecution, testified, that Tom Turney brought the shawl to him and requested him to go along with him, as he knew where he could sell it; and that they went to the house of Bell, and Turney went in, while the witness remained without. He did not know whether the prisoner was in the house or not.

Mary Tinson was called, as a witness on behalf of the prosecution, to prove that property stolen from her had been found in the house of the prisoner.

The Counsel for the prisoner objected to this evidence, because, as they alleged, there was an indictment, pending before the court, against him, for receiving the same goods stolen from Mrs. Tinson.

Maxwell admitted that there was such an indictment: but he said that he did not wish to introduce the testimony, with any other view than to show, that when the prisoner received the goods laid in the present indictment, *he knew them to have been stolen.* In cases for passing counterfeit money, auxiliary testimony, of this nature, was always received. He thought the point had been decided in this court.

Price, in reply, argued, that the case for passing counterfeit money formed the only exception to the general rule, that evidence, relating to offences distinct from that laid in the indictment, could not be introduced. The species of offence laid in this indictment must necessarily depend on its own intrinsic circumstances; and the public prosecutor cannot travel out of the record, and introduce evidence of facts, which the prisoner is not presumed to come prepared to contravert.

The Recorder pronounced the opinion of the court, that the testimony was inadmissable. He said that this crime was different from that of passing counterfeit money: it is a specific offence, and must depend on its own peculiar circumstances.*

Thomas Turney, a boy under fourteen years of age, from Bridewell, was introduced as a witness on behalf of the prosecution and stated, that Henry Gamble brought him the shawl, and that they went together to the prisoner's house, and, in the store, saw Mrs. Bell, and talked to her about selling the shawl. She told him to take it round the back way, when he went through a passage to a back room, and sold her the shawl for 5*s.* and two glasses of cordial.

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* In the case of Philip Mc Niff, tried in this court, in January 1816, for receiving stolen goods, it was decided, that evidence, that the prisoner had purchased goods of the thief, not laid in the indictment, is improper; but that a general understanding between them, to sell on the one part, and receive on the other, stolen goods, is admissable. (1. City Hall Recorder. p. 8.)

They had no conversation with the prisoner,

The case was submitted without remark, by the counsel, when the Recorder charged the jury, that as it was alleged, in the indictment, that this property was stolen by Henry Gamble and Thomas Turney, and as they contradicted each other's statement, in that particular and exculpated the prisoner from the charge of receiving the goods; and as it was a principle in the law, that a party introducing a witness, cannot impeach his testimony, the public prosecutor, in this case was concluded by their testimony, and it was the duty of the jury to acquit the prisoner.

He was acquitted, but remanded for trial on another indictment for receiving stolen goods.

ACT AGAINST REGISTERING AND INSURING LOTTERY TICKETS.

THOMAS GARLAND'S CASE.

MAXWELL and BUNNER, *Counsel for the prosecution.*

PRICE and PHŒNIX, *Counsel for the defendant.*

An act prohibited the registering and insuring tickets in any lottery, *not authorized by the laws of this state*, under a penalty—held, that it was necessary in an indictment under the statute, to name the lottery in which the defendant registered or insured; and further, that if the lottery, so named in the indictment, never existed, or was not drawing, at the time or place stated in the indictment, that the prosecution could not be maintained.

The defendant was indicted for a misdemeanor. The indictment, which contained several counts, alleged that on the 1st. day of August, 1821, a certain lottery, not authorized by the laws of this state, and commonly called *the Grand State Lottery*, was about to be drawn in Baltimore, in the state of Maryland; and that, on the 1st of September, 1821, the defendant did open, set up, exercise and keep, by himself and by other persons, to the jurors unknown, an office, or place for registering the number and numbers of tickets in the said lottery, against the form of the statute. The indictment, in other counts, charged the defendant with having insured numbers 200 and 300, to be drawn *in the lottery aforesaid* (against the chance of their being drawn on the 10th days drawing of the said lottery) to David Earl, against the form of the act. &c.

The statute upon which the indictment was founded in the sixth section declares, "that it shall not be lawful for any person or persons whomsoever, to open, set up, exercise or keep, by himself or herself, or by any other person or persons, any office, or other place, for registering the number or numbers of any ticket or tickets, in any public or private lottery, *not authorized by any law of this state*;" under the penalty of a fine, not exceeding $1000, or imprisonment, not exceeding twelve months; and it is enacted, in the seventh section, "that it shall not be lawful for any person or persons whomsoever, to sell the chance or chances of any ticket, in any such lottery, as aforesaid, or to insure, for or against the drawing of any such lottery as aforesaid, or to insure for or against the drawing any such ticket or tickets," &c—under a penalty of $2000, or, imprisonment twelve months, or both, in the discretion of the court (Laws of New-York 5. Vol. (1819) p. 259. 260.)

David Earl, being sworn, testified, that some time in September last, he went to the lottery office of the defendant, in Reed street, and insured two numbers, 200 and 300, in the *Grand National Lottery*, then drawing in Baltimore, and paid the premium of insurance, $7. 81. The contract was, according to a slip delivered at the time, but which was not produced in evidence, that if those numbers were drawn, on the tenth days drawing, he was to receive $100, on the first number, and $50, on the other.

The prosecution having rested, the defendant's counsel urged to the court, that there was a material variance between the indictment and the proof, in the name of the lottery.

Earl, on being further examined by the counsel for the prosecution, stated,

that he did not know whether the lottery, in which he insured, was the Grand National Lottery, or the Grand State Lottery; but that it was either the one or the other, and was then drawing in Baltimore.

The counsel for the defendant still insisted, that the indictment was not maintained; and, for the purpose of showing how strict this court had been in prosecutions against insuring lottery tickets, Price referred to and read the cases of *John Kenney, et. al.* (3. City Hall Recorder, p. 53.)

Bunner argued, that as the witness had stated that he made the insurance at the defendants office, in one or the other of these lotteries, and that the lottery was then drawing in Baltimore, the testimony was so far, good in support of the indictment; and that if it was further proved that one of these lotteries was drawing, in that place (as he hoped to establish) the proof would be complete.

The Recorder was inclined to the opinion that there was not sufficient before the court and jury, to authorize them in concluding that there was such a lottery as the Grand State Lottery, as alleged in the indictment.

Robert Waite, on being sworn, testified that on the 1st. of September last, "*The State lottery of Maryland*," authorized, as he understood, by the laws of that state, was drawing in Baltimore: that the *Grand National Lottery* was drawing in Washington; but that there was no lottery drawing in Baltimore, by the name of the Grand State Lottery; though some dealers in tickets, in that city, might have so named it in their advertisements.

After further argument from the Counsel, on both sides, The Recorder delivered the opinion of the Court, that the indictment was not supported. He said that soon after the statute against obtaining goods by false pretences was passed, in England, an indictment was found against one, for obtaining certain goods, mentioned in the indictment, *by false pretences*; following the words of the act, but without alleging what the false pretences were; and, on the traverse of the indictment, it was held by the judges, that it was bad, for uncertainty, in not setting forth the pretences by which the goods were obtained. The same doctrine applies to this case: the statute prohibits the registry and insurance of numbers in any lottery, *not authorized by the laws of this state.* It was necessary to allege, in the indictment, what lottery it was in which the numbers were registered and insured; and the framer of the indictment has accordingly stated, in it, that this lottery was commonly called "The Grand State Lottery," and that it was drawing in Baltimore. According to the proof, there was no such lottery: at least, that is not its legal name, nor was it commonly so called. The court, therefore, think the prosecution has failed, and that the jury are bound to acquit the defendant.

He was immediately acquitted.

COUNTERFEITING—EVIDENCE—SCIENTER.

EBENEZER JONES' CASE.

MAXWELL, *Counsel for the Prosecution.*
PRICE and NIVEN, *Counsel for the prisoner.*

On the traverse of an indictment for passing counterfeit money, where it appears that the prisoner, in negociating with the prosecutor, in purchasing an article for which he afterwards passed the counterfeit money, told him that he had not the money, but that if he could get it *of a friend* he would make the purchase, and then went into a house, and returned with a counterfeit bill, which he passed to the prosecutor; it was held, that it was proper evidence, on the part of the prosecution, for the purpose of establishing the *scienter*, to show, that about the same time this purchase took place, two men were arrested in the same house, engaged in coining counterfeit 2*s* pieces: and that, on being searched, counterfeit bank bills were found in their possession.

The prisoner was indicted for counterfeiting, having in possession with an intention of passing, and passing a $5. bill, on the Manhattan Company Bank, and a $3. counterfeit bill, to Wolf B. Pile, on the 17th. of September last.

It appeared from the testimony of Pile, who is a foreigner and speaks our

language but imperfectly, that about a month ago, he had a watch which he was desirous of selling, and offered it to several persons in Chatham street, among whom was the prisoner, who agreed to purchase it for $8. He said that he had not the money with him, but, to oblige him, if he would go with him, he would try to get it *of a friend*. The prisoner then conducted Pile to a house in Water street, which in the progress of the trial appeared to be that of *Peter Lover*, went into the house and returned with a $5 counterfeit bill and a $3 counterfeit bill, which he paid for the watch. Piles soon ascertained that the bills were counterfeit, and procured Joseph L. Hays, a police officer, who went with him to the house and arrested the prisoner, as he was coming out of the door; and, on searching him, a $5. counterfeit bill on the bank of New-York and the watch were found on him.

Maxwell for the purpose of establishing the *scienter*, here offered to prove, that the same day in which the prisoner was arrested, two men, named Quin and Kegan, were taken out of the same house while engaged in coining 2s. pieces, and that counterfeit bank bills and spurious coin were found in their possession. (See *ante* p. 63.)

Price objected to this evidence on these grounds, that *coining* was a specific offence, different from that laid in the indictment; and that no connection had been shown between *Quin* and *Kegan* and the prisoner.

The Recorder said, that as it had been proved, by Pile, that when the negotiation between himself and the prisoner took place, in Chatham street, the prisoner told him that he had not the money by him, but that if he would go with him, he would try to get it *of a friend;* and that the prisoner then took him to this house, where he got the money; it was proper evidence to establish the *scienter* to show, that persons engaged in coining and counterfeiting were taken out of this house, about the same time.

Joseph L. Hays, on being sworn, testified to the arrest of *Quin* and *Kegan*, (see their case.)

Maxwell read the examination of the prisoner in the police, stating among other things, that he got the $5. counterfeit bill of Thomas Quin who promised him $1. for passing it: that *Lover* and *Quin* had counterfeit bills, on various banks, named in the examination, which they offered him, at 25 per cent; but he would not receive them for fear of getting into difficulty. The examination further stated, that he had seen persons apply to those men to purchase counterfeit bills.

The counsel summed up the case and the Recorder charged the jury, when the prisoner was convicted; and on the last day in term, was sentenced to the state prison ten years.

PERJURY—INDICTMENT.

WILLIAM HITCHCOCK'S CASE.

MAXWELL, *Counsel for the prosecution.*

PRICE, *Counsel for the prisoner.*

An indictment for perjury alleged that the oath, in the taking of which the perjury was assigned, was taken by the prisoner, when sworn as a witness, in a certain cause, tried before certain Justices of the Marine court, named in the indictment, *and a jury*; and it appeared on the traverse of the indictment, that the cause was tried by the justices, *and not by a jury*; it was held, that this was a fatal variance between the indictment and the proof.

The prisoner was indicted for wilful and corrupt perjury; and the indictment alleged, in effect, that the false and corrupt oath, set forth in the indictment, was taken by the prisoner, when sworn as a witness, in a cause tried before certain justices of the Marine court, named in the indictment, *and a jury*.

Adrian Hageman, one of the Marine Justices, on being sworn, produced the docket of causes tried in that court, and testified that the cause was tried by the Justices without the intervention of a jury.

It appeared that the affidavit, from which the indictment was framed, was drawn by a person unacquainted with the facts, and this led to the mistake.

On an objection taken to the evi-

ence, on the ground of a variance between the indictment and the proof, it was held, that the variance was fatal; and, under the direction of the court, the prisoner was immediately acquitted.

RECORD OF CONVICTION.

DAVID BARTRON'S CASE.

AXWELL, *Counsel for the prosecution.*

RICE and NIVEN, *Counsel for the prisoner.*

record of conviction for a felony, in that part containing the judgment of the court, should show that he was sentenced for a felony: and in a case where, by mistake, the appropriate word was omitted, it was held, that such record could not be amended, especially after the jury was sworn.

he statute concerning amendments and jeofails (1 R. L. 117.) will not authorize such amendment.

The prisoner, heretofore, and in the erm of July last, convicted in this ourt, for grand larceny, and sentenced o the state prison seven years, (see *ante* . 56.) was indicted under the fifteenth ection of the statute, "declaring the unishment of certain crimes" (1. Vol. R. L. p. 411.) rendering it a felony for ny person, who hath been sentenced to mprisonment in the state prison, for a erm of years, to break the prison and scape; and declaring that such person, eing retaken, shall be adjudged, on conviction, to imprisonment, in the said rison, for double the term of time speified in the original judgment, to commence from the period of the last conviction.

The indictment, after reciting the proceedings on the former trial, alleged, hat for the felony, mentioned in the indictment, the prisoner was sentenced to mprisonment in the state prison for even years: that he was imprisoned; nd that afterwards, on the 9th. of September, 1821, he escaped, contrary to he form of the statute.

Maxwell, after opening the case to he jury, proceeded to read in evidence he record of conviction which (being artly printed) concluded in this manner: therefore it is considered, that the said David Bartron, for the——— aforesaid of which he stands convicted, be imprisoned &c.

Price contended that the omission of the word *felony*, in that part of the record containing the judgment of the court, was fatal, and that the prisoner could not be legally convicted.

Maxwell insisted that the Record was sufficient on two grounds: 1st. That as this was a mere misprision of the clerk, in making out the record; and as, in other parts of the proceedings, there was matter to amend by, that it was in the discretion of the court, to permit the amendment.

2d. That from the whole matter spread on the record, it was obvious that the prisoner was sentenced to the state prison *for a felony*; and, therefore, should those words be entirely omitted, in the judgment of the court, still, the record would be sufficient.

The Recorder pronounced the decision of the court, that as the statute of amendments and jeofails, by its express words, did not apply to criminal cases, the court could not grant leave to amend; and that as the record alone contained, or ought to contain, matter sufficient to show that the prisoner was duly sentenced *for a felony*, to justify the court and jury in convicting him; and as this ought to appear in the record, that the omission of the appropriate word was fatal.

He was acquitted; and being before the court, in custody of the keeper of the state prison, on a *Habeas Corpus*, was remanded to serve the residue of the term for which he was originally sentenced.

SUMMARY FOR DECEMBER, 1821

HIGHWAY ROBBERY.

Lewis Weaver and *John Collins*, during this term, were, severally, indicted, tried and convicted of this offence and sentenced to the state prison for life.

The circumstances of their cases demand notice.

Maxwell and Price conducted the prosecution, in both cases; and Niven was counsel for the prisoner.

On the trial of *Weaver*, (*for robbing Samuel Healy of a hat*) Healy testified, in effect, as follows: I am a money broker, and keep my office at 187 Greenwich street, nearly opposite the North River Bank; and I reside at 107 Washington street. In the evening, I had been in the habit of counting out the money received during the day, at my desk, standing near the window; and there is a brilliant light kept in the office. On the evening of the 28th. of November last, between eight and nine o'clock, I set out, from my office, to go to my house, having, with me, a box, in my pocket, containing 50 or $60, and a pocket book, containing about $200, which I enclosed in a handkerchief. I had to do two errands, one in Fulton street, and the other in Broadway; and, having done these errands, I returned to Greenwich street, through Liberty street, at the foot of which I saw a small man. I proceeded up along the East side of Greenwich street, on my way home; having the handkerchief, containing the pocket book, under my arm; and, as I got near Carlisle street, I saw a man, having on a plaid cloak, turning the corner, and going down that street towards the North River, I was walking faster than he was; and as I came nearly opposite to him, in the same street, by the light of a lamp, I had a distinct view of his face. I thought, at first, from his size and appearance, that he was a neighbour of mine, Mr. John Telfair; and that was the reason I viewed his face by the light of the lamp. I passed him, proceeding down Carlisle street; and had not proceeded far, before I received a violent blow on the back part of my head. I fell: my arm and knees were bruised; and I afterwards found that the violence of the fall had caused a rent in one of the elbows of my coat. When I first recovered, I thought I had a fit; but, by an indescribable feeling, in the back of my head, I found that I had received a blow. As I was attempting to rise, on my hands and knees, I received, or thought I received, a second blow, on my head, which knocked off my hat, several rods, into the street. I saw the hat fly. I hallowed very loud; I cried out Oh Dear! first, and Murder! next. When I first recovered, I saw a man running, from me, very fast, down Carlisle street. I saw his plaid cloak fly as he ran; and believe he was the same man whom I first saw, turning the corner. As I rose, I held on the railing, and I saw a short man whom I told that I had been robbed. I was shortly taken into the house of Mr. Telfair.—I think I am safe in swearing, that the prisoner at the bar is the man whom I saw by the light of the lamp. This club (*a stick of walnut, about two feet long, sawed off from the thickest part of the wrung of a cart, was here produced.*) was found, the next day, near the place, by a servant of Mr. Rankin. I saw a little boy take up a hat, with two handkerchiefs in it, three or four feet from the place. This is the hat. (*an old hat with the handkerchiefs produced*). This knife (*a new sharp pointed butcher knife being produced*) was also found, the next morning, by a servant of Mrs. Eastburn. I am positive this is my hat, which I wore that evening. I purchased it of Brewster; and think I told him to put the initials of my name in the lining. (*a hat of Brewster's manufactory, having some letters, in the lining obliterated, produced*)—I was knocked down on Wednesday evening; and, on Saturday following, I was called upon to go up to the police; and one of the magistrates told me to sit down, and wait, until the prisoners should be brought in, to see if I should know the man; and when the prisoner was brought in, with others, I immediately recognized him. I took the hat, with the two handkerchiefs to the police.—I did not lose the handkerchief containing the money, when I rose from the ground, I held the handkerchief still under my arm.

Resolved Stephens sworn: After the prisoner's examination, this hat (*the one described as that of the prisoner*) and the two handkerchiefs, with other things being in the office, he requested permis-

ion to take one of the handkerchiefs as his own, and he was permitted to take it. He wanted the hat; but this was not permitted. When he was brought into the police, this hat (*Healy's*) was on his head; and it was taken from him.

Thomas M. Collins sworn: On the 28th. of November last, I was in pursuit of the prisoner and one Collins, for having committed another robbery (*see the following case*) and between three and four o'clock, in the morning, I found the prisoner, at the house of Mrs. Ludlum, at the foot of Broome street, near Corlaers hook. I found him in the bed with her, where he went from his own bed, to conceal himself. The husband was present. I found this knife, (*a butchers knife of the same mark and description as the one before produced,*) at the head of the bed, and seized it by the handle, while he grasped it by the blade, and I drew it through his hand and cut him; for, I saw the blood run. I took Collins, the same night, at Charles Snares', at Corlaers hook.

Elizabeth Thomas sworn: Next morning, I found this knife, (*the one first produced,*) in the street, within the railing of Mr. Eastburn's house, in Carlisle street, about ten yards from the lamp post spoken of.

Betsey Westervelt sworn: Next morning, I found this club on the side walk near Mr. Rankins. The lamp is before his door.

Price: We rest.

Niven: I shall prove that the prisoner never wore a plaid cloak, and that he was at another place, that night when Healy was robbed.

Hannah Paul sworn: The prisoner married my sister. I have visited them often; and never saw him wear a plaid cloak. He boarded at Mrs. Ludlums.

Fanny Foster sworn: I have known him three months, and have never seen him wear a plaid cloak.

Niven: I wish a little indulgence from the court, until Mrs, Ludlum comes. I expect to prove, by her, that he was not out that night.

(Trial suspended half an hour for Mrs. Ludlum.)

In the mean time it was admitted by Price that she would testify to that fact, if sworn.

Azel Conklin sworn: Mrs Ludlum told me that the prisoner was out, all the night, when the robbery was committed. (*Mrs. Ludlum here entered the court room, and Niven spoke to her in a low voice.*)

Niven: I shall not examine her to that fact.

Recorder: If the testimony is through, gentlemen, proceed.

Niven: (*in summing up*) There is no proof here, that the prisoner is the same man who knocked Mr. Healy down.

Price: He swears positively to the fact; and, independent of his testimony, the circumstances fully establish his identity. How came he in possession of Healy's hat?—How came his own to be left near the place?—How came he in posession of a knife of the same description as that found? Why did he select and claim the hat and handkerchief, in the police, and take away the latter article?

Recorder: Gentlemen of the jury, if you believe, from the facts and circumstances in this case, that the prisoner is the same man who knocked Mr. Healy down with that club, and took away his hat, you ought to find him guilty.

JURORS: GUILTY.

On the trial of Collins, indicted with Weaver, for robbing John Barry of three watches and $60, in money, John Barry, a foreigner, who speaks the language but imperfectly, testified, in effect, as follows: I live at Mr. Seaman's place, up the East River, opposite Cato's tavern, and four miles from this city. I knew Collins before this robbery took place: the day after he came out of the state prison, he came to my house; and, to relieve him from his distress I gave him a Dollar. On Sunday, the 25th. of November, between eleven and twelve o'clock in the day, Weaver and a Frenchman, (*Antonio an old offender*) came to me, being at my door, and asked me if there was any fire in the house, saying that they were cold, and wanted to warm themselves. I asked them to walk in, which they did, and staid some time Weaver, at length, came out and told

me he wanted to speak to me ; and I then walked in the house with him, and they sat down at the fire. By and by, they asked me if I had seen a man by the name of John Collins. I answered them, that I had not ; and they said that they had heard that he came up the road that morning. They inquired further, if I knew any thing about him, and I told them that I did not, but that I heard that he boarded at Timothy Downings in the Bowery. The Frenchman asked me what number ; and I told him that I could not tell as I was no scholar. The Frenchman pretended to be angry with me for not telling the number. They said that Collins had stolen a quantity of jewellery, belonging to the Frenchman, and that they were in pursuit of him. At length, they bid me good bye, and went out at the gate ; and in about three minutes, Collins came in. My wife told him to be off ; for, that two men had been there, in pursuit of him, for stealing goods. I told him to go off. He smiled, and said that he did not care for any one; and he then walked the room.

Soon afterwards, Weaver and the Frenchman came in. These two, then, laid their hands on Collins, saying, that they had a warrant for him. They cried out to him, " You thief, you thief, give up the jewellery !" Collins, with much apparent calmness, said. " I am no thief —I have stolen nothing from you." My wife said to him, " Collins, why do you not give up the gentlemen their jewellery ? you know you did not bring it here." He said that he knew he did not. The Frenchman then said that the house should be searched. They bolted the door and placed Collins by it to guard it. They began to search. I asked them where their authority was, and they made no answer. Weaver pretended to be an officer and demanded access to my drawers. I thought, in my own mind, that I did not much care, about having the house searched for the jewellery ; and I then lighted a candle and went with them to a little dark room, where my chest was, and unlocked it and took out a box which contained the money. There was a bed in the room, and Weaver seized me and threw me backwards on the bed. The first thing I then saw, was, that the Frenchman drew a dagger and a knife exactly like this (*one of the knives before described*) and held to my throat, foaming at his mouth, and gnashing his teeth, and threatening with the most horrible oaths to murder me ; but Weaver told him to spare my life. Weaver brought a cord and they tied my hands and feet ; and the Frenchman told Weaver to do his duty, and gag me. He went to my wife and took away a handkerchief, which he tied over my mouth. They tied the hands and feet of my wife and my little daughter. They then proceeded to rifle the house. Weaver took from the chest, my pocket book, containing 50 or $60, and two watches and gave to the Frenchman. After they had robbed the house, they said they would go and search up stairs ; and they went out and I saw them no more. Collins who staid at the door while the two others were robbing the house, went off with them.

Margaret Barry sworn : I saw John Collins take my husband's watch, which was hanging up by the looking glass, and put it into his pocket.

Niven : I abandon the defence.

Weaver, having pleaded not guilty to this indictment, *now* withdrew his plea, and pleaded guilty : but his sentence was suspended, on this charge, *in case he should be pardoned for robbing Healy.*

Reader, considering *example* the great end of punishment, had such men ought to be rewarded, for life, with a good home, and comfortable food, drink and clothing, or a halter ? This question is *now* put, for the consideration of the *real friends to humanity. When* a genuine philanthropist, entertaining deep rooted prejudices for a *false theory*, and contemning the experience of ages, on the subject of punishment, shall be knocked down with a club as *Healy* was, or, shall have the sanctuary of his dwelling invaded on the sabbath, as *Barry* had, *then*, let him too, seriously, consider the same question.

COUNTERFEITING and COINING.

Thomas Quin and *James Kegan*, con-

victed of coining during the term of October last, (see *ante.* p. 63) were sentenced to the state prison for life. The Recorder, in pronouncing sentence, stated that the court had maturely considered the questions of law, raised by their counsel, and were clearly of opinion that they were not tenable.

Robert Ferguson, convicted during the term of July last, of counterfeiting and passing counterfeit notes of the *Montreal bank*, (see *ante* p. 57) was sentenced to the state prison ten years. The same questions of law were raised in his case, as in that of *Hester Knapp* (*ante* p. 18.) and the Recorder, in pronouncing sentence, said, that the court had determined that there was no weight in those objections.

Timothy Connor, convicted of counterfeiting &c. in October term last, (see *ante* p. 67.) was sentenced to the state prison ten years.

William Brown, convicted this term, for the same offence, in passing a counterfeit $1 bill, of the bank of New-York, to Matthew Sheridan, was sentenced to the state prison ten years. The prisoner went to the grocery store of Sheridan, at the corner of Grand and Arundal street, and passed the counterfeit bill laid in the indictment, for a glass of liquor; having three months before, passed to him, a $2 counterfeit bill, Sheridan, suspecting the $1. bill to be bad, carried it to the respective neighbouring stores of Mc Laughlin and Palmer. Both pronounced it bad; and when they returned with him, the prisoner said he had no other money. He was conducted by them to the seventh and tenth ward court, and was searched by William F. Stevenson, a police officer, who found on him a counterfeit $10 bill, on the Mechanics bank, and four other counterfeit bills, and five or six six-penny pieces. He said to Stevenson, *D—n it I am gone now!*

GRAND LARCENY.

William Graham, convicted of this offence, in stealing a piece of blue cloth, the property of William B. Titus and Co. was sentenced to the state prison, seven years. *Came out of the penitentiary.*

John Williams, convicted of this offence, in stealing a coat, vest and pair of pantaloons, was sentenced to the state prison five years.

PETIT LARCENY.

Peter Johnson, James Mc Cready, John Battis, John Harrison, Eliza Ann Scott, James Gallighan, Martin Hogan, John Davis, William Plant, Edward Rolan, David Larkin, (who was in state prison eighteen years ago) William H. Ward and David Mc. Kenzie, Mary Haines, John Chambers and Isaac Smith, were severally convicted of this offence; and the one first named was sentenced to the penitentiary three years, the next two years, the seven following, eighteen months each, the three following nine months each: the last for six months The others to the city prison.

The case of *Ward* and *Mc Kenzie* deserves some consideration. They were painters, and had, in times past, sustained good characters. But, recently, they had been in the habit of neglecting their business, and lounging about in groceries, and were frequently in the grocery of Samuel Wallack. (160 Elm) He had often lost segars, and was led to suspect them, and was determined to watch. After candle light, on the 22d. of November, they came into the store, having a glazing box with them. They seated themselves near the shelf where the boxes of segars were piled up. After they had remained there, about a half an hour, Wallack gave his young man a wink, (having, before this, told him to watch them) and they went on the outside of the store, and, looking through the window, saw Mc, Kenzie take a box of segars from the shelf, hand it to Ward, who wrapped it up in his handkerchief, and put it into the glazing box. Wallack and his young man came immediately in, when Wallack said, "Now *I know* where my segars have gone." And he then took the segars out of the box. The prisoners pretended not to know how they came there. They said that the box must have rolled off the shelf.! On the trial, it was pretended that it was but *a joke*.

CRUELTY TO A BEAST.

Michael Purdy, a farmer of Westchester county, was indicted, tried, and convicted of this offence, in tying up the nose of a calf to prevent its sucking. Rulef Dyrea, the prosecutor, seeing the cow and calf in misery, in consequence of this cruelty, peaceably requested the defendant to suffer the calf to suck; but he said he would do as he pleased with *his own*. The prosecutor then went to the police. In his testimony, on the trial, he stated that he had known the bag of cows to burst in consequence of the calf being thus prevented from sucking. The Defendant was fined $50, and the costs. (See Owen Morris *et al.* case, *ante* p. 62.)